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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 148

CORNELIUS FULLBRIGHT,
Petitioner,

VERSUS

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SHAPARD AND SHAPARD
By DAVID C. SHAPARD
200 Penn Square Bank Building
Oklahoma City, Oklahoma
Counsel for Petitioner

May, 1968

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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Cornelius Fullbright, Petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on the 4th day of April, 1968.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is unreported as yet and is reproduced in the Appendix to the Petition (Appendix A).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on the 4th day of April, 1968. Rehearing was denied on the 30th day of April, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Rules of this Court.

QUESTIONS PRESENTED

Did the facts proven, justify conviction on the 5 charges as set forth in the complaint?

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States which states in pertinent parts:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law;"

STATEMENT OF THE CASE

This is an appeal by petitioner (defendant), from the United States District Court of the Western District of Oklahoma in which the defendant was found guilty by the court in a trial and was sentenced to three years for violation of Title 26 U.S.C. Secs. 5601(a)(1), (a)(4), (a)(7), and 5604(a)(1).

The counts were as follows (R. 1):

COUNT ONE: That the defendant had in his possession and control, two stills and distilling apparatus which was not registered as required by Section 5719(a).

COUNT TWO: Defendant was charged with carrying on a business of a distillery without having given bond as required by law in violation of Sec. 5601(a)(4) Title 26 U.S.C.

COUNT THREE: The charge of making mash for production of distilled spirits on premises not the designated premises for a distilled spirits plant lawfully qualified to produce distilled spirits in violation of Sec. 5601 (a)(7) Title 26 U.S.C.

COUNT FOUR: Charged the defendant with transporting and possessing 74 gallons of distilled spirits contained in 74 one-gallon jugs all required to be stamped under Sec. 525(a)(2) Title 26 U.S.C.

COUNT FIVE: Provided that they had in their possession certain property which listed 150 feet of garden hose, 80 one-gallon empty jugs, one 55-gallon cooling barrel with a radiator condensor, four 5-gallon buckets, one 55-gallon mixing barrel, one lead lime and dome, 1,400 gallons of mash, three 55-gallon fermenters, two burners, 18 gallons of non-taxpaid distilled spirits and four 100-pound butane bottles which property and liquor was intended for use in violation of Sec. 5601(a)(1) 47 Title 26 U.S.C.

The evidence was presented in a statement made by the United States District Attorney in court, which was stipulated to as being the evidence presented. The court thereupon pronounced a conviction with no evidence of any witnesses other than the stipulation and the testimony as introduced in the Motion to Suppress.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the reason that the District Attorney did not prove or introduce any evidence which proved any of the 5 counts as set out in the indictment. By failing to prove said counts, the appellant is entitled to a dismissal and was entitled to a verdict of the District Court of "Not Guilty."

The entire evidence is shown in the record at page 34 through page 60.

The facts proven do not justify a conviction.

COUNT ONE. The defendant had in his possession and control, two stills and distilling apparatus which was not registered as required by Section 5179(a).

Not one single solitary place in that testimony is there any evidence in regard to Count One of the complaint. It is necessary for the United States Government to prove that the distilling apparatus was not registered as required by Section 5179(a) and there was no proof even attempted to show lack of registration.

COUNT TWO. The defendant was charged with carrying on a business of a distillery without having given bond as required by law in violation of Section 5601(a)(4) Title 26 United States Code.

Not one speck of testimony was given or stipulated to as to the lack of a bond or that the distilling was a type of process that requires a bond.

COUNT THREE. The charge of making mash for production of distilled spirits on premises not the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits in violation of Section 5601 (a)(7) Title 26 U.S.C.

Not one iota of evidence was shown that the mash was produced on such premises or that it was not a designated premises for a distilled spirits plant lawfully qualified to produce distilled spirits.

COUNT FOUR. Provided that the defendant did transport and possess 74 gallons of distilled spirits contained in 74 one-gallon jugs all required to be stamped under provision of 525(a)(2) Title 26 U.S.C.

While it is true that the general statement was made in the testimony presented by the State by stipulation for the Court's consideration that there were no stamps on the distilled spirits. The statute in this matter which is Section 5205(a)(2) provides that there are specific instances where stamps are not required:

(a) Distilled spirits lawfully withdrawn from bond for consumption on the premises. No evidence was shown that this was not one of the exceptions and that it was not for consumption on the premises at all.

(b) Said distilled spirits in customs' custody and this could have been in customs' custody. No showing was made as to the reputation of the defendant or that he was not a customs' employee.

(c) Provided that if it is in the actual process of rectification, blending or bottling or in the process of manufacturing, that it does not have to be stamped and there is no showing that this was not the case.

(d) Provided a general section that Section 5205(a) does not apply to any distilled spirits on which no internal revenue tax is required to be paid, and there was no showing that this was the type of distilled spirits that required a tax to be paid on it.

(e) Provided that if it is not intended for sale or for use in manufacturing or production of any article intended for sale that no stamp is required. There was no showing or evidence whatsoever in connection with this matter.

(f) The section does not apply if it is in the hands of a regular established common carrier receiving

transport or for transportation and delivery of distiled spirits in the course of business or as a common carrier.

No showing was made in any of the proof offered by the Government that the distilled spirits did not come under one of these exceptions.

COUNT FIVE. Provided that they had in their possession certain property and then listed 150 feet of garden hose, 80 one-gallon empty jugs, one 55-gallon cooling barrel with a radiator condenser, four 5-gallon buckets, one 55-gallon mixing barrel, one lead lime and dome, 1,400 gallons of mash, three 55-gallon fermenters, two burners, 18 gallons non-taxpaid distilled spirits and four 100-pound butane bottles which property and liquor was intended for use in violation of Section 5601(a)(1) 47 Title 26 United States Code.

Not one bit of evidence was ever introduced to show anything in relation to any of these items. No testimony was introduced saying that any of the above items were ever seen or present. Not one bit of evidence was stipulated to or introduced in support of Count Five.

In *Brinegar* v. *United States*, 338 U.S. 160, 93 L.Ed. 1879 the Court said at page 1889:

> "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard."

Thus *no* proof on the five (5) counts upon which a conviction is based has deprived the defendant (petitioner) of "due process."

In *Beal* v. *United States,* 32 F.2d 1002, and in *Edwards* v. *United States,* 7 F.2d 357 the Court held where evidence in a case is as consistent with innocence as with guilt, a conviction cannot be sustained. The evidence must exclude every other hypothesis but that of guilt.

CONCLUSION

For the reasons above stated, petitioner respectfully suggests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

SHAPARD AND SHAPARD
By DAVID C. SHAPARD
200 Penn Square Bank Building
Oklahoma City, Oklahoma
Counsel for Petitioner

May, 1968